

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

Drif-

77-4060

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HECTOR MOTA-SANTANA, :

Petitioner, :

-v- :

: Docket No. 77-4060

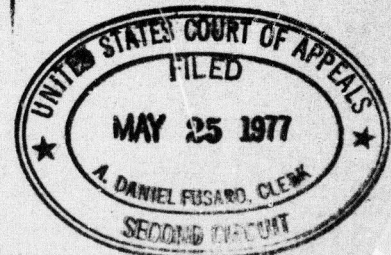
IMMIGRATION AND NATURALIZATION :
SERVICE (by its District Director :
at New York, New York), :

Respondent. :

PETITIONER'S BRIEF

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MAY, 1977



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Pastore v. Pastore, 100 N.Y.S. 2d 552
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Full Faith and Credit Statute, 28 U.S.C. Section, 1738, requires the Immigration and Naturalization Service to give full faith and credit to a final New York judgment of annulment of a marriage.

2. Whether, for immigration law purposes a New York judgment of annulment of a marriage relates back to the date of the marriage or to the date of the decree.

STATEMENT OF THE CASE

Petitioner Hector Mota-Santana ("Mota-Santana") is an alien and citizen of the Dominican Republic. In May, 1970 he was admitted to the United States for permanent residence as the unmarried son of a lawful permanent resident exempt from the labor certification requirement of the Act. However, after he had obtained his immigrant visa and before he applied for admission to the United States, he married in the Dominican Republic. This event occurred five days before such admission.

Because it developed that his wife did not wish to join him in the United States, Mota-Santana sued for an annulment of his marriage (R. 14a) in a New York State Court and obtained a decree in January, 1974 (R. 17a).

Upon the institution of deportation proceedings by the Service of an Order to Show Cause (R. 1a-2a), an Immigration Judge held (R. 3a-5a) that the annulment decree relates back to the date of Mota-Santana's marriage and that Mota-Santana had not been "married" at the time of his admission, the "marriage" having been declared a nullity by the courts of the State of New York.

On appeal by the Service (R. 6a), the Board of Immigration Appeals recommended (R. 7a-8a) for inclusion of the annulment decree in the record of the deportation

proceeding and for a new decision by the Immigration Judge on the argued record. This decision (R. 10a-13a), revised his previous determination and denied Mota-Santana's application to terminate the proceedings. The Immigration Judge held, (R. 12a) that "even if full faith and credit was given to the annulment decree to void the marriage ab initio, (Mota-Santana) was still inadmissible to the United States at the time of entry. Under the facts which existed at the time of entry, regardless of what effect the courts might give to the decree of annulment, the respondent was inadmissible at that time (underlining supplied)".

Mota-Santana appealed (R. 21a) to the Board of Immigration Appeals from that decision specifically involving 28 U.S.C. Sec. 1738. The Board failed to pass on the contention that the statute required it to accept the effect of a New York annulment as voiding the marriage ab initio. It followed (R. 23a) its own but unrelated case where it held that "retroactive effect will not be given to a decree of annulment if to do so would act to be a clear violation of the immigration laws.

This petition for review followed.

STATUTES INVOLVED

28 U.S.C.

Sec. 1738 State and Territorial statutes and judicial proceedings; full faith and credit.

* * * * *

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

New York Domestic Relations Law, Sec. 7

A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

* * * * *

(4) Consent to such marriage by reason of force, duress or fraud;

ARGUMENT

POINT I

THE FULL FAITH & CREDIT STATUTE, 28 U.S.C.
SEC. 1738, REQUIRES THAT THE NEW YORK JUDGMENT
OF ANNULMENT BE GIVEN FULL FAITH & CREDIT

This case presents a question of first impression, namely whether, this Court, in this review proceeding, must give full faith & credit to an annulment decree issued by a New York State Court. In his first opinion (R. 3a-5a) the Immigration Judge held that he was bound by the interpretation of Sec. 7 of the Domestic Relations Law by New York's highest court, the Court of Appeals, in Matter of Moncrief, 235 N.Y. 390 (1923).

This was in conformance with previous immigration decisions, such as Matter of B - 3 L&N Dec. 102 (1947) and Matter of F - 9 L&N Dec. 275 (1961). However, the Board of Immigration Appeals has now receded from that position, Matter of Wong, BIA, Jan 12, 1977.

Not being a "Court of the United States" the Board has failed to consider the applicability of Sec. 1738 although the question was presented in the notice of appeal to it, R. 21a.

The issue before this Court narrows to whether in this review proceeding, the Court is bound by the mandate of Sec. 1738. Inevitably the answer must be "yes".

POINT II
THE NEW YORK COURTS HAVE CONSISTENTLY
GRANTED ANNULMENTS OF MARRIAGES FOR
IMMIGRATION FRAUD

In Miodownick v. Miodownick, 19 N.Y.S. 2d 175, (1940) an Appellate Division has affirmed a judgment of annulment of a marriage for immigration fraud. This was followed by a score of other cases, chief among which is Pastore v. Pastore, 100 N.Y.S. 2d 552 (1950).

The basic New York decision, Matter of Moncrief, supra is still the ultimate authority as to the meaning of Sec. 7 of the New York Domestic Relations Law.

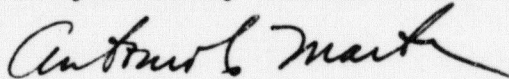
This Court should follow Moncrief and reverse the order of the Board of Immigration Appeals which had failed to do so.

CONCLUSION

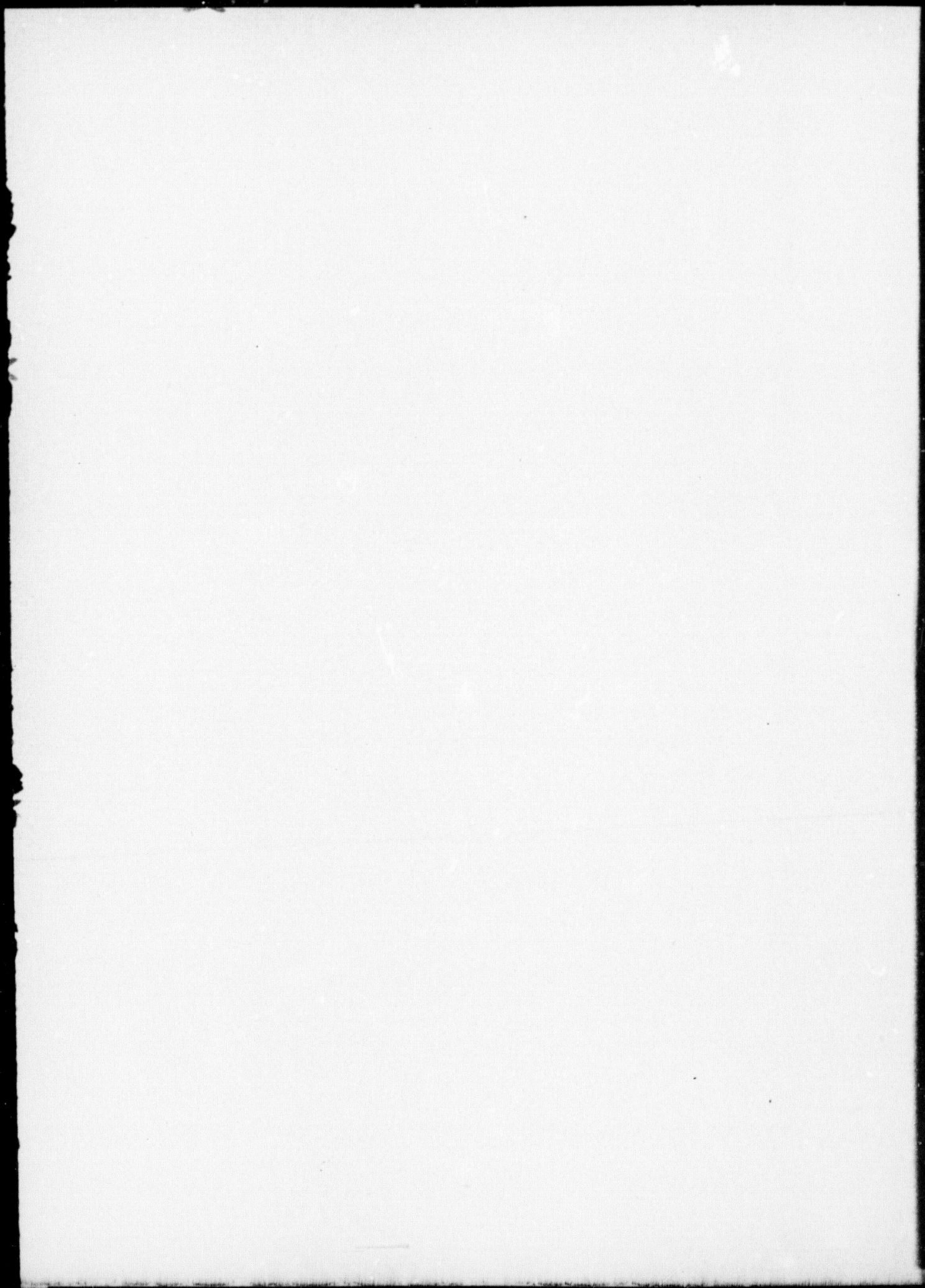
For the following reasons, the decision and order of the Board of Immigration Appeals dated January 31, 1977, should be reversed and the deportation proceedings ordered to be terminated.

New York, N.Y.
May 25, 1977

Respectfully Submitted,



Antonio C. Martinez



②

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Robert B. Fiske, Jr.
UNITED STATES ATTORNEY

5/25/77
Marion F. Bryant